Supreme Court U.S.
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No. ——

In The

Supreme Court of the United States

October Term, 1997

JAMES E. POWELL, *et al.*,

Petitioners,

v.

THE STATE OF FLORIDA, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Responding to *Employees v. Missouri*, 411 U.S. 279 (1973), the Fair Labor Standards Act (FLSA) was amended to expressly provide a federal forum for State employees suing for FLSA violations. 29 U.S.C. § 216(b). After a Tenth Amendment challenge to the FLSA was defeated (*Garcia*, 469 U.S. 528 (1985)), States actively helped draft amendments to it. Employees' right to sue a State in federal court remained. The FLSA allows employee suits for legal and equitable relief, unless the Secretary of Labor intervenes. 29 U.S.C. § 216(b).

1. After *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), does the Eleventh Amendment bar State employees from bringing an FLSA action for unpaid wages in federal court?

2. May a federal court dismiss employees' FLSA action on Eleventh Amendment grounds, if the State-employer refuses to consent to suit in its own courts for FLSA claims, and its courts deem the sovereign immunity defense a jurisdictional bar?

3. May State employees sue State officers in federal court for *Ex parte Young* prospective relief to halt on-going violations of the FLSA?

4. Did States consent to FLSA suits in federal court or waive immunity, by actively helping to draft the 1985 amendments, by using special FLSA benefits that save them money, or by adopting the FLSA?

QUESTIONS PRESENTED – Continued

5. Does an Eleventh Amendment defense preclude sending similarly-situated State employees *Quern*-type notice informing of the FLSA right to opt-in to a pending action brought on their behalf?

PARTIES TO THE PROCEEDINGS BELOW

State employees JAMES (JIMMIE) E. POWELL and RUSSELL R. SMITH were Plaintiffs in the District Court, and Appellants before the United States Court of Appeals for the Eleventh Circuit. They brought the suit and appealed on behalf of themselves and similarly situated employees.

Defendants/Appellees were the STATE OF FLORIDA; LAWTON CHILES, as Governor; and WILLIAM LINDER, as Secretary of the Department of Management Services.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit, entered January 9, 1998.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eleventh Circuit is reported at 132 F.3d 677, and is reproduced in its entirety in the Appendix, pp. 1-3 (P.App. 1-3).

The opinion of the United States District Court for the Southern District of Florida, is not reported. It is reproduced in full. P.App. 4-12.

JURISDICTION

The jurisdiction of the district court for the Southern District of Florida was invoked under 29 U.S.C. § 216(b) (Fair Labor Standards Act) and 28 U.S.C. § 1331 (general federal question jurisdiction). On August 6, 1996, the district court granted respondents' motion for dismissal. P.App. 4.

The Eleventh Circuit on January 9, 1998 entered opinion and judgment affirming the decisions. P.App. 1.

The jurisdiction of this Court to review the judgment of the Eleventh Circuit is invoked under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISIONS, AND STATUTES

The text of the following constitutional provisions and statutes, is included in the Appendix:

The Supremacy Clause, U.S. Const. Art. VI, cl. 2

The Eleventh Amendment, U.S. Const. amend. XI

29 U.S.C. § 211(a)

29 U.S.C. § 215(a), (b)

29 U.S.C. § 216(b)

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STATEMENT OF THE CASE

The State of Florida is an employer as defined in the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. § 201 *et seq.* (FLSA), and is thus required to comply with its minimum wage and overtime provisions. 29 U.S.C. §§ 203(d), 203(x), 216(b).

The State's Department of Management Services (DMS) is responsible for promulgating personnel policies and rules for all employees of the State of Florida. Individual State agencies must abide by the personnel rules and policies promulgated by the DMS. Fla.Stat. §§ 110.201(1), 110.219(5)(a).

Plaintiffs in this action are employees as defined in the FLSA. 29 U.S.C. § 203(e)(2)(C). They were and are

designated by the State as "excluded" employees for purposes of not paying them overtime wages for overtime hours they work.

A complaint for unpaid overtime wages was filed against the State of Florida on March 10, 1995, in the United States District Court for the Southern District of Florida. The complaint was filed by James (Jimmie) Powell on behalf of himself and other State employees who were similarly situated. Shortly thereafter, he was joined by Russell Smith who filed a notice of consent pursuant to the opt-in provisions of 29 U.S.C. § 216(b).

The complaint alleged that although excluded employees are not paid for overtime hours they work, their wages are subject to docking for violation of minor work rules and for partial day absences. The State admitted that under its personnel rules, excluded employees' pay can be docked for disciplinary reasons.

The State first moved to dismiss the complaint, claiming insufficient service of process. The motion to dismiss was denied September 26, 1995. The State answered the complaint December 5, 1995, claiming plaintiffs were "in positions which are subject to exemption from coverage of the FLSA." R1-25, defense 1.

The employee-plaintiffs filed a motion dated November 30, 1995, for leave to distribute notification of opt-in rights to similarly situated employees pursuant to the opt-in provisions of 29 U.S.C. § 216(b). When the motion had been pending for more than sixty days without opposition or response from the State, a notice of pendency was filed with the court. After another sixty days had elapsed without response, the trial judge *sua sponte*,

issued an order directing the State to respond to the opt-in motion by April 15, 1996. Rather than responding, the State filed a motion to stay its response. Its motion for stay was denied May 10, 1996.

Relying on *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), on April 15, 1996 the State moved for leave to amend its answer in order to raise the Eleventh Amendment as an affirmative defense. Also in response to *Seminole*, the Employees moved for leave to amend their complaint to add a count for prospective injunctive relief to restrain on-going violations of the FLSA overtime laws, and to add Governor Chiles and Secretary of the Department of Management Services, William Linder, as defendants. Both motions were granted.

Thereafter, the State moved to dismiss both counts of the amended complaint. It urged dismissal of Count I for unpaid overtime wages on Eleventh Amendment grounds based upon *Seminole*, and urged dismissal of Count II for injunctive relief based upon its claim that only the Secretary of Labor may seek an injunction to halt FLSA violations. The district court granted the motion to dismiss the amended complaint in an order dated August 6, 1996. In the order, any pending motions including the November 30, 1995 opt-in motion, were denied as moot.

The district court held that after *Seminole*, state employees are barred by the Eleventh Amendment from suing a state-employer for monetary damages, because even though Congress had clearly expressed its intent to abrogate states' Eleventh Amendment immunity in the text of the FLSA, Congress lacked authority to do so. In so finding, the district court concluded that the FLSA was

enacted pursuant to the Interstate Commerce Clause, and that the Fifth and Fourteenth Amendments were not implicated when the FLSA was amended to include public sector employees.

With respect to employees' argument that if they could not sue their state-employer in federal court, they would be denied a forum to pursue money damages under the FLSA because the State refused to waive its sovereign immunity for FLSA claims in its own courts, the district court acknowledged that there is no precedent establishing that the federal government may require state courts to hear federal causes of action that are barred by the Eleventh Amendment. The court concluded however, that this could not impact a court's analysis of whether an FLSA suit should proceed in federal court.

The district court also concluded that the State had not expressly waived Eleventh Amendment immunity, nor consented to suit in federal court for FLSA violations.

Lastly, the district court held that the employees could not obtain *Ex parte Young* injunctive relief because "the right to bring an action for injunctive relief under the FLSA rests exclusively with the United States Secretary of Labor." (Citations omitted).

A timely notice of appeal to the Eleventh Circuit was filed September 5, 1996.

In its January 9, 1998 opinion, the Eleventh Circuit affirmed the trial court's dismissal. It relied on *Seminole* in affirming dismissal of Count I for money damages on Eleventh Amendment grounds. In affirming dismissal of the count for *Ex parte Young* injunctive relief, it relied on

decisions from other Circuits which held that employees suing private sector employers may only sue for money damages, and not for injunctive relief which in their opinion, is the exclusive province of the Secretary of Labor.

The Eleventh Circuit did not address Employees' argument that they would be left with no remedy because the State was asserting its sovereign immunity against suits in its own courts for FLSA violations; nor their argument that the states had consented to suit in federal courts for FLSA violations by actively participating in drafting the 1985 amendments to the FLSA which retained the provision subjecting them to suit in federal court, by accepting the benefits of special FLSA provisions available only to public sector employers, and in the case of the State of Florida, by adopting the FLSA in its administrative code and expressing its intent to be bound by the FLSA.

REASONS FOR GRANTING THE WRIT

I. The Eleventh Circuit's Decision Conflicts With Decisions Of This Court

A. Understanding The FLSA

The FLSA is a law of general applicability in both the public and private sectors. *New York v. U.S.*, 505 U.S. 144, 160 (1992).

The Court has recognized that legislation passed by Congress which is equally applicable to private parties, is different. *See, e.g., FERC v. Mississippi*, 456 U.S. 742,

758-759 (1982) (examining extent to which state sovereignty shields states from generally applicable federal regulations).

A Tenth Amendment challenge to the constitutionality of the FLSA as applied to the public sector, was defeated in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), where the Court held its application did not offend States' sovereignty.

Employees, including those in the public sector, must be paid overtime wages unless they are bona fide executives, administrators, or professionals as defined by the Secretary of Labor. 29 U.S.C. § 213(a)(1); *Moreau v. Klevenhagen*, 508 U.S. 22, n. 16 (1989) ("an exception to the general FLSA rule mandating overtime pay for overtime work" is a "benefit" of which a public sector employer is free to avail itself as long as it complies with all conditions for use of that benefit).

Employees who are denied overtime wages may not be subject to pay-docking for violations of minor work rules, or for variations in the quality or quantity of work performed. *Auer v. Robbins*, 117 S.Ct. 905 (1997); 29 C.F.R. § 541.118(a).

B. Conflict Regarding Eleventh Amendment Issue

At the outset, it is important to note that the Court in *Seminole Tribe v. Florida*, 517 U.S. 44, 116 S.Ct. 1114 (1996), suggested that its reach was limited. To this extent, the Eleventh Circuit's decision that the Eleventh Amendment bars FLSA suits for wages by State employees in federal courts, may conflict with *Seminole*.

Indeed, the *Seminole* dissent expressed deep concern about the potential breadth of the decision, fearing it would effectively prohibit federal jurisdiction over suits against states to enforce a broad range of federal laws including "regulation of our vast national economy." *Id.* U.S. at 77, n. 1, S.Ct. at 1134, n. 1 (J. Stevens, dissenting).

The majority however, severely criticized this concern, terming it "exaggerated both in its substance and in its significance [and] misleadingly overbroad", and indicated *Seminole* might not apply where there is an "established tradition in the lower federal courts of allowing enforcement of those federal statutes against the States." *Id.* U.S. at 72-73 n. 16, S.Ct. at 1131-1132 n. 16.

There is an established tradition of applying the FLSA to the States. *See, e.g., Reich v. State of New York*, 3 F.3d 581, 591 (2d Cir. 1993), *cert. denied*, 510 U.S. 1163 (1994); *Michigan Ass'n of Government Employees v. Michigan*, 992 F.2d 82 (6th Cir. 1993); *Hale v. State of Arizona*, 993 F.2d 1387, 1391-1392 (9th Cir.) (*en banc*), *cert. denied*, 510 U.S. 946 (1993); *Brinkman v. Department of Corrections of Kansas*, 21 F.3d 370, 372 (10th Cir.), *cert. denied*, 115 S.Ct. 315 (1994); *Dybach v. State of Florida*, 942 F.2d 1562 (11th Cir. 1991); *Reich v. Dept. of Conservation & Natural Resources of the State of Alabama*, 28 F.3d 1076 (11th Cir. 1994).

Even prior to the decision in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), and the 1985 amendments to the FLSA that brought all public sector employers under the FLSA, it had applied to so-called non-traditional functions in which states were engaged. *See* 75 Stat. 65, 29 U.S.C. §§ 203(r) and (s),

206(b), 207(a)(2) (1964 ed.) (state run "enterprises" included in definition of employer); 80 Stat. 831, 832, 29 U.S.C. §§ 203(d), 203(s)(4) (1964 ed., Supp. II); *Maryland v. Wirtz*, 392 U.S. 183, 188 (1968) (amendments to include state schools and hospitals as employers subject to FLSA, was constitutional); *National League of Cities v. Usery*, 426 U.S. 833, 852 (1976) (1974 amendments to FLSA unconstitutional only with respect to "traditional" government functions).

The Eleventh Circuit's decision also conflicts in principle with the concepts expressed in *Idaho v. Coeur d'Alene Tribe*, 117 S.Ct. 2028 (1997). The lead opinion in *Coeur d'Alene* stated that Article III courts have a "special obligation to ensure the supremacy of federal statutory and constitutional law" when there is no state forum available to vindicate federal interests. *Id.* at 2035.

In this vein, the lead opinion stated there was no need to adopt the *Young* devise because the Idaho courts "are open to hear the case, and the State neither has nor claims immunity from their process or their binding judgment", and also acknowledged the States' real interest in preferring their own forum for suits brought against them. *Id.* 2036.

Yet, the Eleventh Circuit dismissed the suit here, even though the State of Florida, relying on Fla.Stat. § 768.28, refuses to consent to FLSA suits against it in its own courts. R1-6-2, 3 ("The State of Florida has not consented to suit in actions brought pursuant to the Fair Labor Standards Act."). *See also Hill v. Department of Corrections, State of Florida*, 513 So.2d 129, 131 (Fla. 1987), *cert. denied*, 484 U.S. 1064 (1988) (under § 768.28 Florida

waived its sovereign immunity on a limited basis only with respect to torts); *Gamble v. Florida Department of Health and Rehabilitative Services*, 779 F.2d 1509 (11th Cir. 1986) (State waived immunity only for traditional torts, thus retaining its state common law immunity against suit brought under federal law).

This refusal is significant because as this Court itself has acknowledged, Florida courts deem sovereign immunity a jurisdictional bar. *Howlett v. Rose*, 496 U.S. 356 n. 5 (1990). In *Howlett*, the Court held that Florida courts could not *discriminate against* federal claims properly before them. But what if the state court is not *discriminating* against the federal claim? What if the state court is merely adhering to the same jurisdictional bar as the federal court?

Howlett, 496 U.S. 356, 372 (1990), suggests that this might be the type of valid "neutral" excuse for a state court to justifiably refuse jurisdiction. *See also Railroad Co. v. Tennessee*, 101 U.S. 337, 339, 25 L.Ed. 960 (1880) ("The principle is elementary that a State cannot be sued in its own courts without its consent."); *Beers v. Arkansas*, 61 U.S. (20 How.) 527, 529, 15 L.Ed. 991 (1858) (it is an "established principle of jurisprudence" that the sovereign cannot be sued in its own courts without its consent); *Seminole*, 517 U.S. at 71 n. 14 ("this Court is empowered to review a question of federal law arising from a state-court decision where a State *has consented* to suit") (emphasis added); *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 39 (1994) (dicta) ("parties with claims against a State [may] present them, if the State permits, in the State's own tribunals."). (Emphasis added).

While the Supremacy Clause is sometimes cited as the reason state courts must hear federal claims in cases properly before them, it is not clear that it could be used to force a state court to hear an FLSA claim where (as is now argued) Congress lacked authority to abrogate Eleventh Amendment immunity in federal courts for FLSA claims. If Congress lacks power to override immunity in federal court, does it have power to compel States and their courts to override their immunity bar.

In other contexts, some state appellate courts have found that the Supremacy Clause does not preempt state sovereign immunity against suit in its own courts. *See, e.g., Morris v. Massachusetts Maritime Academy*, 565 N.E. 2d 422, 426 (Mass. 1991) (unless it consents, state is protected against Jones Act suit in state court because implied assumption in U.S. Constitution was that state sovereign immunity continues in both state and federal courts); *Widgeon v. Eastern Shore Hospital Center*, 479 A.2d 921 (Md. 1984).

This raises the further argument that since the Supremacy Clause applies as much, if not more, to federal courts, a federal court should not dismiss a federal question case (especially a statute already found to be constitutional), unless there is clearly a state forum to hear the case against a State even if the State refuses to consent to it.

In the final analysis, States should not be permitted to erode federal authority and circumvent federal regulations especially where this would destroy the uniformity thought essential by Congress, and where the state knew and accepted federal regulation for thirteen years. *United*

Transportation Union v. L.I.R.R. Co., 455 U.S. 678, 687, 689 (1982). Nor should a State have it both ways – Eleventh Amendment immunity against FLSA claims against it in federal court, and the jurisdictional bar of state sovereign immunity against FLSA claims in its own courts.

Accordingly, it is important for this Court to sort out these constitutional issues which affect all States as employers subject to the FLSA, and the tens of thousands of State employees who Congress sought to protect in it, and who have in the past been protected by it.

C. Conflict With *Ex parte Young*

The practical effect of the Eleventh Circuit's decision is that state employees are left with a statutory right under the FLSA, but no remedy – they can neither get money, nor an injunction to halt on-going violations, nor help from the Secretary of Labor.

The decision to dismiss the count for prospective injunctive relief conflicts with the principles of *Ex parte Young*, 209 U.S. 123 (1908) and its progeny, with *Seminole*,[1] and the recent decision in *Idaho v. Coeur d'Alene Tribe*, 117 S.Ct. 2028 (1997).

Count II of the amended complaint sought injunctive relief against State officials regarding future classification as employees exempt from overtime wages, and regarding changes to discipline and leave policies which violate federal law. It did not seek money damages for past

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[1] In *Seminole*, nn. 14 and 16, the principles of *Young* were reaffirmed.

violations. It alleged on-going violations of federal law, and alleged employees had no adequate remedy at law.

If the employees here could not be awarded money damages because of the Eleventh Amendment, they should at least have been able to put an end to the continuing violations of federal law. The Supremacy Clause mandates it.

The very purpose for which *Young* was established was to hold state officials to the Supreme authority of the United States. *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144 (1993) (*Young* ensures states will not employ the Eleventh Amendment to avoid compliance with federal law); *Green v. Mansour*, 474 U.S. 64, 68 (1985) (*Young* gives life to the Supremacy Clause).

Indeed, the best explanation for *Young* is that the Supremacy Clause creates an implied right of action for injunctive relief against state officers threatening to violate the Federal Constitution or laws. 13B C. Wright, A. Miller & E. Cooper, Federal Practice & Procedure, Jurisdiction 2d § 3566, p. 102 (2d ed. 1984); *see also Bush v. Lucas*, 462 U.S. 367, 374, 381-390 (1983) ("federal courts' power to grant relief not expressly authorized by Congress is firmly established", and depends on the nature of the right to be vindicated and the existence and adequacy of alternative statutory remedies); *Cort v. Ash*, 422 U.S. 66, 78 (1975) (setting forth four-prong test for determining whether a private right of action may be implied from a statute that does not expressly provide it).

The ability to obtain injunctive relief is even more critical here since employees have no alternative statutory remedy. They are being denied recovery of monetary damages in federal court, and state courts are probably closed to them because the State has refused to consent to the suit in its own courts.

Moreover, the Secretary of Labor has admitted that she is unable to handle these cases and that if the Eleventh Amendment bars private suits in federal court, this effectively leaves State employees with a right, but no remedy. The Secretary of Labor relies heavily on the ability of employees to obtain private representation to enforce the FLSA. *See Employees of the Department of Public Health v. Department of Public Health of Missouri*, 411 U.S. 279, 297 n. 12, 305 (1973) (J. Marshall, concurring in result) (unrealistic to expect Government enforcement alone to be sufficient); (J. Brennan, dissent) (United States as *amicus curiae* stating employees would be left with a right without a remedy because the DOL has neither the resources nor the staff to investigate violations).

Significantly, the DOL's inability to police wage and hour violations has not improved. *See* Zachary, *Short-changed-Many Firms Refuse to Pay for Overtime, Employees Complain*, Wall St.J., June 24, 1996, at 1, col. 6, quoting Maria Echaveste, chief of the DOL's Wage and Hour Division, noting the number of investigators is down 15% from 1990 and acknowledging DOL not even able to ascertain the extent of violations nationwide.

In fact, in *Employees v. Missouri*, 411 U.S. 279, 286 (1973), the Court speculated that perhaps Congress did not intend to abrogate Eleventh Amendment immunity

because Congress thought the Secretary's ability to obtain injunctive relief, was remedy enough for State employees. In response, Congress quickly amended the FLSA to make it clear that it *did* intend to abrogate Eleventh Amendment immunity for FLSA claims so employees could bring their own suits against their state employer.

Notably, the *Young* doctrine was addressed recently in *Idaho v. Coeur d'Alene*, 117 S.Ct. 2028 (1997). In the lead opinion, the Court indicated that when federal courts are determining whether to exercise jurisdiction over a suit against state officers, the court must engage in case specific analysis of a number of concerns, including whether a state forum is available to hear the dispute, and the nature of the particular federal right implicated – concerns which are certainly present here.

The Eleventh Circuit held only the Secretary of Labor may sue for injunctive relief. A close reading of the pertinent FLSA provisions, however, indicates employees' right to sue their employer for legal and equitable relief terminates only if the Secretary of Labor intervenes under 29 U.S.C. § 217. Their right to equitable relief is limited, if at all, only by the authority expressly given the Secretary – namely, to intervene under § 217 and restrain withholding of wages and obtain reinstatement for an employee discharged in retaliation for bringing or participating in an FLSA claim. 29 U.S.C. §§ 211(a), 215(a), 216(b), 217.

Employees here are not seeking injunctive relief to obtain wages or reinstatement. Nor has the Secretary intervened. They seek only to obtain reclassification or a change in rules applicable to them. Such injunctive relief

is not expressly forbidden to them in the statute. Accordingly, a court may – and under *Young* must – imply a right to injunctive relief for state employees who are unable to obtain money damages for past violations.

Not one of the cases relied upon by both the district court and Eleventh Circuit, deal with *Ex parte Young* and Eleventh Amendment issues. They basically held that private sector employees could obtain only monetary damages from their employer, not both monetary and injunctive relief. They did not deal with a situation where the employees would have no remedy whatsoever without injunctive relief.

The Eleventh Circuit also conflicts in principle with the assumption in *Wilson-Jones v. Caveniss*, 99 F.3d 203, 211 (6th Cir. 1996), *modified on other grounds*, 107 F.3d 358 (6th Cir. 1997) that, even with an Eleventh Amendment bar, "A state employee can still sue a state officer in federal court for an injunction ordering the officer to comply with the FLSA, as *Ex parte Young*, 209 U.S. 123 [] (1908), cuts a broad exception from the Eleventh Amendment bar for actions seeking injunctive relief from state officers." *See also Avitia v. Metropolitan Club of Chicago, Inc.*, 924 F.2d 689, 691 n. 1 (7th Cir. 1991), where the court while not deciding the issue, noted that it was a significant statutory issue with sensible arguments on both sides for the proposition that seeking reinstatement was not the exclusive domain of the Secretary of Labor.

D. Conflict Regarding Issue Of Opt-in Motion

A similarly situated individual is not a party to a pending FLSA action unless and until, he or she expressly

"opts-in" by filing a written consent to join the action, with the court where the case is pending. 29 U.S.C. § 216(b). Courts are authorized to participate in the § 216(b) opt-in process as part of their case management powers. *Hoffman-LaRoche, Inc. v. Sperling*, 493 U.S. 165, 169-171 (1989).

Denying the opt-in motion almost a year after it was filed, because of the Eleventh Amendment defense that was raised after the motion had already been pending for almost five months, conflicts with the principles enunciated in *Quern v. Jordan*, 440 U.S. 332 (1979).

In *Quern* the Court held that the Eleventh Amendment does not prevent a trial court from ordering state officials to send out informational notices to members of plaintiffs' class, where the notices simply informed them of available procedures, where the decision on subsequent action was left to the recipient, and where members were 'given no more * * * than what they would have gathered by sitting in the courtroom.' *Id.* at 349. (citations omitted).

The proposed notice that was attached to the opt-in motion here, met the *Quern* test. It was merely informational since it simply advised similarly situated employees of their statutory right under 29 U.S.C. § 216(b), to opt-in to the pending action. It did not require expenditure of State funds because plaintiffs would have paid the costs of printing and distributing the notices. It expressly stated the court had not decided the merits of the action, and contained no language implying that the court declared the state's prior conduct violated the law.

Accordingly, it was not the type of notice disapproved in *Green v. Mansour*, 474 U.S. 64 (1985).

Notably, it was the constraints imposed by Local Rule, that made it necessary for Employees to seek leave of court before distributing notification of opt-in rights to employees who were similarly situated to the named plaintiffs who brought the suit on their behalf. By local rule, parties and their counsel are forbidden from communicating with potential class members without prior court approval of the communication. Local Rule 23.1(B) for the Southern District of Florida (S.D.Fla.L.R. 23.1(B)). The district court had the power to at least release counsel from the proscriptions of this local rule.

Moreover, the State had waived its right to object to the motion. Employees filed their motion for leave in November 1995, the State raised an Eleventh Amendment immunity defense April 1996, and the complaint was not dismissed until August 1996 – almost a year after the motion was filed. In that interim period, the State declined four opportunities to respond or object to the opt-in motion, including the court's order that the State respond.

By Local Rule, once a court is notified a motion has been pending for more than ninety days, the court "shall issue an order resolving the motion" within ten days. S.D.Fla.L.R. 7.1(B)(3). In addition, the failure to respond to a motion may itself be deemed sufficient reason to grant the motion by default. S.D.Fla.L.R. 7.1(C).

Lastly, the failure to allow similarly situated employees to opt-in, was prejudicial to plaintiffs because

only the filing of a consent definitively tolls the statute of limitations.

II. The Decision Below Raises Important And Unresolved Problems With Far-reaching And Recurring Implications Nationwide

A. The Unique Role Of The FLSA

The stakes here are high. The questions impact the ability of Congress to *enforce* legislation for the benefit of the entire country. It impacts the ability of State employees throughout the Nation to have a forum where their FLSA claims against their state-employer may be heard.

At issue as well, is whether the Supremacy Clause will countenance an Eleventh Amendment interpretation that effectively allows States to "opt-out" of the FLSA, at the expense of employees who would have a right, but no remedy under a constitutional statute enacted by Congress for their benefit, and for the benefit of the national health and economy.

The FLSA is a law of general applicability and affects virtually all employers and employees in both the public and private sectors. It is one of the most pervasive federal laws we have. Enforcement of its terms has enormous impact and importance to the public. It is a humanitarian and remedial statute intended to protect *employees*. 29 U.S.C. § 202(a).

It is apparent that Congress deemed it imperative that the FLSA apply to States. In *Employees v. Missouri*, 411 U.S. 279, 283-284 (1973), the Court held the action by

state employees for overtime pay was barred by the Eleventh Amendment because Congress had not clearly abrogated states' immunity, because the 1966 FLSA amendments extending coverage to certain state employees, did not amend 216(b) to authorize suits against public employers in federal courts.

Congress promptly responded to this perceived deficiency, took Justice Brennan's suggestion to heart, and amended the FLSA accordingly. *See* 29 U.S.C. §§ 203(d) (employer includes public agencies); 203(x) (public agency includes government of a State); 203(e)(2)(C) (employee includes individuals employed by a State); 216(b).

As the Eleventh Circuit correctly noted, P.App. 2, there have already been a number of Circuits affirming dismissal of FLSA claims against States brought in federal court, based on the *Seminole* decision. See *Quillin v. Oregon*, 127 F.3d 1136 (9th Cir. 1997); *Close v. New York*, 125 F.3d 31 (2d Cir. 1997); *Mills v. Maine*, 118 F.3d 37 (1st Cir. 1997); *Aaron v. Kansas*, 115 F.3d 813 (10th Cir. 1997); *Raper v. Iowa*, 115 F.3d 623 (8th Cir. 1997).

Accordingly, the Court should intercede to avoid a patch-work quilt of differing interpretations of the FLSA based upon the State in which a state employee works, and to answer the question of whether *Seminole* effectively overruled *Garcia* and *Employees v. Missouri, sub silentio*, and whether *Employees v. Missouri* sent Congress off to perform a nugatory exercise.

B. The Eleventh Circuit's Decision Leaves State Employees With A Right, But No Remedy

Notably, the availability to plaintiffs of alternative remedies was cited in *Seminole* as a reason why it was acceptable to dismiss the case on jurisdictional grounds – other avenues were available. That is not the case here.

The Eleventh Circuit held employees could receive neither money damages nor injunctive relief in federal court. The doors to federal courts are closed.

Employees of the State of Florida (and other states), are barred on jurisdictional grounds from the state courts, because the State is insisting on its sovereign immunity against such claims in its own courts. See Argument I.B. The doors to state courts are probably closed.

The Secretary of Labor has admitted publicly, and to this Court, that she is unable to pursue or even investigate these claims. See Argument I.C.

Only this Court can intercede and answer the questions and correct the enormous problems and inequities that have been inflicted upon state employees in the wake of *Seminole*.

C. Seminole Need Not Be Overruled For State Employees To Recover Wages

Although there may be valid arguments for overruling *Seminole Tribe v. Florida*, 517 U.S. 44, 116 S.Ct. 1114 (1996), this would not be necessary for employees here to

obtain retrospective monetary relief from their state-employer.

First, the Court may find the States consented to FLSA suits in federal courts because they actively worked with Congress and drafted the 1985 FLSA amendments that left them suable in federal courts by their employees. *See Seminole*, 116 S.Ct. 1114, 1122, 1123, 1132 (1996) (Eleventh Amendment is not a bar if the state consented to suit in federal court for a specific statute).[2]

The legislative history of the FLSA reflects this active participation. *Local 2203 v. West Adams County*, 877 F.2d 814, 821 n. 10 (10th Cir. 1989) (after analyzing legislative history, court determined it is evident the public sector actively and substantially participated, by appearances at hearings, through lobbying organizations, and through letters read on the floor of both houses and made part of the Congressional Record; 1985 U.S. Code & Cong. Admin. News 651, 657 (1985) (hearings attended by states and their lobbying organizations such as National Association of State Personnel Directors, and National Conference of State Legislatures).

Congress considered the states' special problems, incorporated their input, and responded to their concerns: "the States and their political subdivisions have identified several respects in which they would be

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[2] The State of Florida conceded that Congress made its intent to abrogate states' Eleventh Amendment immunity to suit in federal court unmistakably clear in the text of the FLSA. R1-35-3; P. App. 5.

injured by immediate application of the FLSA. This legislation responds to these concerns by adjusting certain FLSA principles with respect to employees of states and their political subdivisions * * * . We have received extensive testimony on this subject from representatives of state and local governments". 1985 U.S. Code Cong. & Admin. News 651, at 655, 656. *And see* 652, 663; 29 U.S.C. § 216 note. Yet, the provision expressly subjecting States to suit in federal courts for FLSA violations, remained.

This active participation is significant given the holdings in *Garcia*, 469 U.S. 528 (1985), *South Carolina v. Baker*, 485 U.S. 506, 512-513 (1988), and *Gregory v. Ashcroft*, 501 U.S. 452, 464, 477 (1991), all of which hold the public sector's protection from Congressional regulation is found in the national political process. With respect to the FLSA, the States actively participated in the national political process which left them suable-in federal court, while also making them beneficiaries of special FLSA exemptions and benefits which save them money.

The Court may also find consent by virtue of the fact that states have accepted and benefitted momentarily from the special exemptions provided by Congress that are available only to public sector employers. 29 U.S.C. §§ 207(k), (o), (p), (special exemptions for states and political subdivisions); 29 C.F.R. Part 553 (special provisions for public sector).

The State of Florida avails itself of these special FLSA provisions. *See* F.A.C. § 60K-5.024(2)(c) ("The Department may approve an extended work period under the provisions of the FLSA"); § 60K-5.025(4)(b) 1. to 5. (FLSA special compensatory leave credits); and the 29 U.S.C.

§ 213(a)(1) exemption for employees employed in a bona fide executive, administrative, or professional capacity, that the State invoked here and in *Dybach v. State of Florida*, 942 F.2d 1562 (11th Cir. 1991).

Second, the Court may decide that States such as Florida, who refuse to consent to suits in their own courts for FLSA claims by their employees, must be suable in federal court for those claims.

It is true that *Coeur d'Alene*, 117 S.Ct. 2028, 2043 (1997) recognized that states have an interest in their *preference* to suit in their own courts: "The dignity and status of its statehood allows Idaho to rely on its Eleventh Amendment immunity and to insist upon responding to these claims in its own courts, which are open to hear and determine the case.".

Because of the Supremacy Clause, however, that entitlement to preference in one court or another, cannot be extended to mean states are entitled to decide not to be sued *anywhere* for violation of the FLSA. Indeed, *Coeur d'Alene* made particular note that if there is no state forum for vindication of federal rights, then federal courts have a "special obligation" to ensure the supremacy of federal law. As noted above, in Florida sovereign immunity is a jurisdictional bar, so the doors to the state courts are probably closed to State employees' FLSA claims.

Third, because the FLSA is a law of general applicability, States are being sued not as States, but are sued as employers just like any other employer in the Nation. Accordingly, the compliance of each State is essential to

national uniformity. And, as noted above, the FLSA has repeatedly been applied against States in federal courts.

Lastly, it must also be remembered, that the Constitution is there to protect the individual, not abstract political entities, to control lawless government, and not to limit federal courts in their efforts to vindicate federal rights. *New York v. U.S.*, 505 U.S. 144, 181 (1992); *Cohens v. Virginia*, 6 Wheat. 264, 5 L.Ed. 257, 383, 407 (1821); Amar, *Of Sovereignty and Federalism*, 96 Yale L.J. 1425, 1485 (1987).

Additional unresolved questions include whether a State such as Florida, consents to suit in federal court by declaring its intent to be bound by the FLSA in its Administrative Code,[3] whether the Fourteenth and Fifth Amendments were implicated once the FLSA became applicable in the public sector, and whether the Spending Clause is implicated since the Federal Government receives less tax revenue from public sector employees because of the special provisions allowing public sector employers to give compensatory time off in lieu of cash for overtime hours worked, and since the State of Florida

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[3] For example, Florida Administrative Code Chapter 60K-5; 60K-5.022(6) (defining hours of work in accordance with FLSA); 5.022(9) (defining "excluded position" in terms of overtime provisions of FLSA); 5.022(10) (defining "regular rate of pay" as that "necessary to meet requirements of the FLSA"); 5.023(1)(b) (control overtime to "ensure compliance with the FLSA); 5.023(1)(d) (provide training "with particular attention to the provisions of the Fair Labor Standards Act (FLSA) as applicable to public employees"); and Fla.Stat. § 110.201(3) (State's personnel rules "shall comply with all federal regulations necessary to permit the state agencies to be eligible to receive federal funds).

receives federal funds such as FEMA funds to subsidize state employees' wages.

CONCLUSION

For these reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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April 9, 1998

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 96-5119

D. C. Docket No. 95-6233-Civ-WJZ

JAMES E. POWELL, on behalf of himself and all others present and former employees similarly situated, RUSSELL R. SMITH,
Plaintiffs-Appellants,

versus

STATE OF FLORIDA, LAWTON CHILES, Governor, WILLIAM LINDER, Secretary, Secretary of the Department of Management Services,
Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Florida

(January 9, 1998)

Before TJOFLAT and BIRCH, Circuit Judges, and RONEY, Senior Circuit Judge.

PER CURIAM:

Plaintiff, James E. Powell, attempting to bring a class action, sued the State of Florida for back wages for overtime work and for injunctive enforcement of the Fair Labor Standards Act, 29 U.S.C. §§ 201-219 (1994). He

alleges that he and his alleged class members were misclassified as "excluded" employees for the purpose of not paying overtime wages for overtime hours that they worked.

The district court properly dismissed the claim for unpaid overtime wages based on the State's Eleventh Amendment immunity. *Seminole Tribe of Florida v. Florida*, ___ U.S. ___, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996). *See Quillin v. Oregon*, Nos. 96-35790, 96-35777, 1997 WL 644043 at *1 (9th Cir. Oct. 21, 1997); *Close v. New York*, No. 1248, Docket 96-9252, 1997 WL 540848 at *4 (2d Cir. Sept. 4, 1997); *Mills v. Maine*, 118 F.3d 37, 40 (1st Cir. 1997); *Aaron v. Kansas*, 115 F.3d 813, 814 (10th Cir. 1997); *Raper v. Iowa;*, 115 F.3d 623, 624 (8th Cir. 1997); *Balgowan v. New Jersey*, 115 F.3d 214, 217 (3d Cir. 1997); *Moad v. Arkansas State Police Dep't*, 111 F.3d 585, 586 (8th Cir. 1997); *Wilson-Jones v. Caviness*, 99 F.3d 203, 210 (6th Cir. 1996), *reh'g denied and amended by* 107 F.3d 358 (6th Cir. 1997). *Compare Timmer v. Michigan Dep't of Commerce*, 104 F.3d 833, 838-40 (6th Cir. 1997) (no Eleventh Amendment immunity from suits brought under the Equal Pay Act because that Act could have been passed pursuant to Congress's Fourteenth Amendment powers).

The district court properly held that the right to bring an action for injunctive relief under the Fair Labor Standards Act rests exclusively with the United States Secretary of Labor. *See* 29 U.S.C. §§ 211(a), 216(b) (1994); Reogr. Plan No. 6 of 1950, 15 Fed. Reg. 3174, *reprinted in* 5 U.S.C. app. at 1469 (1994). Although this Court has not yet addressed the issue, we follow the decisions of the other circuits which have held that the plain language of the Act provides that the Secretary of Labor has the

exclusive right to bring an action for injunctive relief. *See Barrentine v. Arkansas-Best Freight System*, 750 F.2d 47, 51 (1984) ("only the Secretary is vested with the authority to seek an injunction"); *Morelock v. NCR Corp.*, 546 F.2d 682, 688 (6th Cir. 1976), *rev'd on other grounds*, 435 U.S. 911 (1978) ("[I]ndividuals are limited to seeking legal remedies and are precluded from obtaining injunctive relief."); *Powell v. Washington Post Co.*, 267 F.2d 651, 652 (D.C. Cir. 1959) ("In so far as plaintiff's prayer relates to action by the Secretary to restrain violations, the answer is that the appeal is to his discretion."); *Roberg v. Phipps Estate*, 156 F.2d 958, 963 (2d Cir. 1946) ("[T]he Administrator has exclusive authority to bring such an [injunction] action."); *Bowe v. Judson C. Burns, Inc.*, 137 F.2d 37, 39 (3d Cir. 1943) ("We think it is plain from this language that the right of the administrator to bring an action for injunctive relief is an exclusive right.").

With this decision, it is apparent that the argument that alleged class members should have been given opt-in notification is moot.

AFFIRMED

UNITED STATES
DISTRICT COURT
SOUTHERN DISTRICT
OF FLORIDA

JAMES E. POWELL,

Plaintiff,

vs.

THE STATE OF FLORIDA, et al.,

Defendant.

CASE NO.
95-6233-CIV-ZLOCH

FINAL ORDER OF DISMISSAL

(Filed Aug. 6, 1996)

THIS MATTER is before the Court upon the Defendants, State of Florida, Governor Lawton Chiles and Secretary of the Department of Management Services William Linder's, Motion To Dismiss Plaintiff's Amended Complaint (DE 54). This Court has carefully reviewed the merits of said Motion and is otherwise fully advised in the premises.

The Plaintiff, James E. Powell, commenced the above-styled cause pursuant to the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 *et seq.* In the Amended Complaint filed herein (annexed to DE 46), the Plaintiff seeks monetary damages for unpaid overtime wages against the Defendant, the State of Florida, and injunctive relief against the Defendants Governor Lawton Chiles and Secretary of the Department of Management Services William Linder.

With respect to the Plaintiff's pursuit of monetary damages against the State of Florida, the Defendants

assert that such suit is prohibited by the Eleventh Amendment. The Eleventh Amendment provides:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by Citizens of Subjects of any foreign State."

U.S. Const. amend. XI. Although not apparent from a reading of the text of the amendment, the United States Supreme Court has consistently interpreted the Eleventh Amendment to prohibit suits in federal court against state governments by a state's own citizens. *Edelman v. Jordan*, 415 U.S. 651, 662-663 (1974); *Hans v. Louisiana*, 134 U.S. 1, 15 (1890).

Congress may, however, override the Eleventh Amendment and authorize suits against states in federal court. *See Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976) To determine whether Congress has abrogated the states' immunity from suit, the Court must determine: (1) "whether Congress has 'unequivocally expressed its intent to abrogate the immunity;' " and (2) "whether Congress has acted 'pursuant to a valid exercise of power.' " *Seminole Tribe of Florida v. Florida*, 116 S.Ct. 1114, 1123 (1996) (quoting *Green v. Mansour*, 474 U.S. 64 (1985).

The Court notes that the State of Florida does not assert that Congress failed to unequivocally express its intent to abrogate the states' Eleventh Amendment immunity under the FLSA. Indeed, such an assertion would be futile. *See* 29 U.S.C. § 216(b) (providing that "any employer (including public agency) is subject to liability under the FLSA); 29 U.S.C. § 203(x) (defining

"public agency" as "the Government of the United States; the government of . . . a State or political subdivision thereof; any agency of . . . a State; or any interstate governmental agency"). Rather, the State of Florida, relying on *Seminole Tribe*, contends that Congress did not act pursuant to a valid exercise of power.

In *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), the Supreme Court held that Congress, when acting pursuant to § 5 of the Fourteenth Amendment, could authorize suits against the states in federal court. Subsequently, a plurality of the Supreme Court extended *Fitzpatrick* and found that the plenary character of the Interstate Commerce Clause granted Congress the power to abrogate state sovereign immunity. *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989). Recently, however, in considering whether Congress could abrogate state sovereign immunity pursuant to the Indian Commerce Clause, the Supreme Court expressly overruled *Union Gas*. *Seminole Tribe of Florida v. Florida*, 116 S.Ct. 1114, 1128 (1996). Declaring *Union Gas* a "solitary departure from established law," *id.*, the *Seminole Tribe* Court explained that Congress does not have the authority under the Interstate Commerce Clause to abrogate state sovereign immunity. *Id.*

The legislative history of the FLSA clearly reveals that, in enacting the FLSA, Congress was acting pursuant to the Interstate Commerce Clause:

> It is declared to be the policy of this chapter, through the exercise by Congress of its power to regulate commerce among the several States with foreign nations, to correct as rapidly as practicable to eliminate the conditions above

> referenced to in such industries without substantially curtailing employment or earning power.

29 U.S.C. § 202(b). The Plaintiff does not deny that Congress enacted the FLSA pursuant to the Interstate Commerce Clause. Rather, the Plaintiff urges several reasons why the *Seminole Tribe* Court's statement that "Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction [by the Eleventh Amendment]," 116 S.Ct. at 1131, should not apply to the FLSA.

The Plaintiff's reliance on *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), is misplaced. In *Garcia*, the Supreme Court held that state and local governments were subject to the FLSA. *Garcia* overruled *National League of Cities v. Usery*, 426 U.S. 833 (1976), which held that the Tenth Amendment precluded Congress from extending FLSA protection to state and local government employees working in areas of traditional government functions. Contrary to the Plaintiff's assertion, the Defendants are not requesting the Court to resurrect *National League of Cities* and find that Congress did not have the authority under the Commerce Clause to extend FLSA protection to state and local government employees. Rather, the Defendants are requesting the Court to recognize that the Eleventh Amendment prohibits FLSA suits by state employees against the State of Florida in federal court. Therefore, the Supreme Court's decision in *Garcia* is unavailing to the Plaintiff.

The Plaintiff also asserts that after Congress amended the FLSA to include government employees, the Fifth and the Fourteenth Amendments were implicated.

Obviously, the Plaintiff invokes the Fourteenth Amendment because the Supreme Court has held that Congress, when acting pursuant to § 5, could authorize suits against the states in federal court. *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976). However, the findings and purposes contained in § 202 are exclusively expressed in terms of interstate commerce. Furthermore, the Plaintiff has cited no case that suggests that Congress enacted the FLSA pursuant to the Fourteenth Amendment. Finally, the Court has been unable to discover any legislative purpose that would support the exercise of congressional power under the Fourteenth Amendment.

The Plaintiff urges that by interpreting *Seminole Tribe* to preclude suits against a state in federal court, the Plaintiff would not have a forum to pursue a claim for damages. The Plaintiff asserts that no forum would be available because the State of Florida has not waived its sovereign immunity to suit under the FLSA in the state courts. The Court recognizes that the Supreme Court, when deciding whether a state could be sued in federal court, has often assumed that state courts would be available to hear federal claims. *See, e.g., Hilton v. South Carolina Public Railways Commission*, 502 U.S. 197, 198-207 (1991) (concluding that when "a federal statute . . . imposes[s] liability upon the States, the Supremacy Clause makes that statute the law in every State, fully enforceable in state court"); *Maine v. Thiboutout*, 448 U.S. 1, 9 n.7 (1980) ("[n]o Eleventh Amendment question is present, of course, where an action is brought in a state court since the amendment, by its terms restrains only the Judicial power of the United States"). Notwithstanding, the Supreme Court has not created an exception to the

Eleventh Amendment for those claims against states which cannot be heard in state court and this Court likewise declines to do so.

Nevertheless, the Court notes that the Plaintiff's fear that the state courts could not hear an FLSA claim against the State of Florida may be unfounded. 29 U.S.C. § 216(b) provides that "[a]n action to recover [under the FLSA] may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction. . . . " 29 U.S.C. § 216(b). The Court notes that Florida has courts of general jurisdiction competent to hear suits of this character. *See* Fla. Const. art. V, §§ 5(b), 20(c)(3); Florida Statutes, 26.012.

Clearly, state courts are required to apply federal law in cases properly before them. *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816). Furthermore, under *Testa v. Katt*, 330 U.S. 386 (1947), a state court not only can, but , in appropriate cases, must hear federal causes of action. However, because *Testa* involved a cause of action against a private defendant rather than a state, the case did not raise the question of the State's sovereign immunity. A question arises as to whether *Testa* allows Congress to require state courts to hear suits by private individuals barred from the federal courts by the Eleventh Amendment. *General Oil v. Crain*, 209 U.S 211 (1908) strongly suggests that the federal government may require state courts to hear federal causes of action barred by the Eleventh Amendment. Regardless, the issue of whether the state courts must hear an FLSA suit against the State of Florida does not impact the Court's analysis of whether the Eleventh Amendment prohibits such suit in federal court.

Finally, the Plaintiff asserts that *Seminole Tribe* was wrongly decided and that the pervasive, remedial and humanitarian nature of the FLSA warrants a finding that Congress has the authority to abrogate Eleventh Amendment state immunity for violations of the FLSA. These assertions are without merit. Applying *Seminole Tribe* to the instant case, the Court concludes that Congress did not have authority, under the Interstate Commerce Clause, to abrogate the immunity of the Defendant, the State of Florida, to suits under the FLSA.

The Plaintiff further asserts that the State of Florida has expressly waived its Eleventh Amendment immunity and consented to suit in federal court for violations of the FLSA. The Court notes that "if a State waives its immunity and consents to suit in federal court, the Eleventh Amendment does not bar the action." *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238 (1985). The Supreme Court has stated, however, that the "test for determining whether a state has waived its [Eleventh Amendment] immunity is a stringent one." *Id.* at 241.

Express waivers of a state's Eleventh Amendment sovereign immunity must be explicitly authorized by the state "in its constitution, statutes and decisions." *Silver v. Baggiano*, 804 F.2d 1211, 1214 (11th Cir. 1986) (citation omitted). In *Edelman v. Jordan*, 415 U.S. 651 (1974), the Court declared that a state will be deemed to have waived its immunity "only where stated 'by the most express language or by such overwhelming implications from the text as will leave no room for any other reasonable construction.' " *Id.* at 673 (citation omitted). The Court finds that the Plaintiff has failed to demonstrate that the State of Florida has given express consent to the

instant action. Therefore, the Court concludes that the State of Florida has not expressly waived its Eleventh Amendment sovereign immunity.

In Count II of the Amended Complaint filed herein (annexed to DE 46), the Plaintiff seeks injunctive relief against the Defendants, Governor Lawton Chiles and Secretary of the Department of Management Services, William Linder. The Eleventh Amendment does not bar the Plaintiff from obtaining a federal injunction against a state officer to force the officer to comply with the law. *Ex parte Young*, 209 U.S. 123 (1908). Therefore, there is no constitutional jurisdictional bar to the Plaintiff's suit for prospective injunctive relief against Governor Chiles and Secretary Linder. However, the right to bring an action for injunctive relief under the FLSA rests exclusively with the United States Secretary of Labor. *See* 29 U.S.C. § 217; *Barentine v. Arkansas Freight Systems*, 750 F.2d 47 (8th Cir. 1984); *Keenan v. Allen*, 889 F.Supp. 1320 (E.D. Wash. 1995); *Avitia v. Metropolitan Club of Chicago*, 731 F.Supp. 872 (N.D. Ill. 1990).

Accordingly, after due consideration, it is

ORDERED AND ADJUDGED as follows:

1. The Defendants, State of Florida, Lawton Chiles and William Linder's, Motion To Dismiss Plaintiff's Amended Complaint (DE 54) be and the same is hereby **GRANTED**;

2. Plaintiff's Amended Complaint (annexed to DE 46) be and the same is hereby **DISMISSED**;

3. The above-styled cause be and the same is hereby **DISMISSED**; and

4. To the extent not otherwise disposed of herein, all pending Motions are hereby **DENIED** as moot.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 6th day of August, 1996.

/s/ William J. Zloch
WILLIAM J. ZLOCH
United States District Judge

Copies furnished:

Brenda J. Carter, Esq.
JC Miller, Esq.

RELEVANT CONSTITUTIONAL PROVISIONS, AND STATUTES

Supremacy Clause. This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. Art. VI, cl. 2.

Eleventh Amendment. The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. Amend. XI.

29 U.S.C. § 211. Investigation, inspections, records, and homework regulations.

(a) The Administrator or his designated representatives may investigate and gather data regarding the wages, hours, and other conditions and practices of employment in any industry subject to this Act, and may enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices, or matters as he may deem necessary or appropriate to determine whether any person has violated any provision of

this Act, or which may aid in the enforcement of the provisions of this Act. Except as provided in subsection (b) of this section, the Administrator shall utilize the bureaus and divisions of the Department of Labor for all the investigations and inspections necessary under this section. Except as provided in section 12 [child labor], the Administrator shall bring all actions under section 17 to restrain violations of this Act.

29 U.S.C. § 215. Prohibited acts – Prima facie evidence.

(a) After the expiration of one hundred and twenty days from the date of the enactment of this Act, it shall be unlawful for any person –

(1) to transport, offer for transportation, ship, deliver, or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the production of which any employee was employed in violation of section 6 [minimum wage] or section 7 [maximum hour], or in violation of any regulation or order of the Administrator issued under section 14; except that no provisions of this Act shall impose any liability upon any common carrier for the transportation in commerce in the regular course of its business of any goods not produced by such common carrier, and no provision of this Act shall excuse any common carrier from its obligation to accept any goods for transportation; and except that any such transportation, offer, shipment, delivery, or sale of such goods by a purchaser who acquired them in good faith in reliance on written assurance from the producer that the goods were produced in compliance with the requirements of the Act,

and who acquired such goods for value without notice of any such violation, shall not be deemed unlawful;

(2) to violate any of the provisions of section 6 or 7 [minimum wage or maximum hour], or any of the provisions of any regulation or order of the Administrator issued under section 14;

(3) to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee.

(4) to violate any of the provisions of section 12 [child labor];

(5) to violate any of the provisions of section 11(c) [record keeping] * * * .

(b) For the purposes of subsection (a)(1) proof that any employee was employed in any place of employment where goods shipped or sold in commerce were produced, within ninety days prior to the removal of the goods from such place of employment, shall be prima facie evidence that such employee was engaged in the production of such goods.

29 U.S.C. § 216: ***Damages; right of action; attorney's fees and costs; termination of right of action.***

* * *

(b) Any employer who violates the provisions of section 6 or 7 of this Act shall be liable to the employee or

employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages.

Any employer who violates the provisions of section 15(a)(3) of this Act shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 15(a)(3), including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages.

An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.

The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.

The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 17 in which (1) restraint is sought of any further delay in the

payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 6 or section 7 of this Act by an employer liable therefor under the provisions of this subsection or (2) legal or equitable relief is sought as a result of alleged violations of section 15(a)(3).

(c) The Secretary is authorized to supervise the payment of the unpaid minimum wages or the unpaid overtime compensation owing to any employee or employees under section 6 or 7 of this Act, and the agreement of any employee to accept such payment shall upon payment in full constitute a waiver by such employee of any right he may have had under subsection (b) of this section to such unpaid minimum wages or unpaid overtime compensation and an additional equal amount as liquidated damages. The Secretary may bring an action in any court of competent jurisdiction to recover the amount of the unpaid minimum wages or overtime compensation and an additional amount as liquidated damages. The right provided by subsection (b) to bring an action by or on behalf of any employee and of any employee to become a party plaintiff to any such action shall terminate upon the filing of a complaint by the Secretary in an action under this subsection in which recovery is sought of unpaid overtime minimum wages or overtime compensation under sections 6 and 7 or liquidated or other damages provided by this subsection owing to such employee by an employer liable under the provisions of subsection (b), unless such action is dismissed without prejudice on motion of the Secretary. Any sums thus recovered by the Administrator on behalf of an employee pursuant to this subsection shall be held in a special deposit account and

shall be paid, on order of the Administrator, directly to the employee or employees affected. Any such sums not paid to an employee because of inability to do so within a period of three years shall be covered into the Treasury of the United States as miscellaneous receipts. In determining when an action is commenced by the Administrator under this subsection for the purposes of the statutes of limitations provided in section 6(a) of the Portal-to-Portal Act of 1947, it shall be considered to be commenced in the case of any individual claimant on the date when the complaint is filed if he is specifically named as a party plaintiff in the complaint, or if his name is added as a party plaintiff in such action.

* * *

29 U.S.C. § 217. Injunction proceedings. The district courts, together with the United States District Court for the District of the Canal Zone, the District Court of the Virgin Islands, and the District Court of Guam shall have jurisdiction, for cause shown, to restrain violations of section 15, including in the case of violations of section 15(a)(2) the restraint of any withholding of payment of minimum wages or overtime compensation found by the court to be due to employees under this Act (except sums which employees are barred from recovering, at the time of the commencement of the action to restrain the violations, by virtue of the provisions of section 6 of the Portal to Portal Act of 1947 [29 U.S.C. § 255]).

(2)

Supreme Court, U.S.
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No. 97-1667

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

JAMES E. POWELL, et al.,

Petitioners,

vs.

STATE OF FLORIDA, et al.,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court of Appeals
For The Eleventh Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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19 pp

QUESTIONS PRESENTED

Respondents submit that this appeal presents no more than two issues for review and would restate them as follows:

1. Whether the Eleventh Amendment bars a state employee's action against a State in federal court pursuant to the Fair Labor Standards Act ("FLSA") to recover allegedly unpaid wages.

2. Whether state employees can sue state officers for prospective injunctive relief pursuant to *Ex Parte Young* to halt alleged violations of FLSA when the Secretary of Labor has been designated, pursuant to 29 U.S.C. §211(a), to bring all actions to restrain violations of the Act.

For the reasons set forth in the statement of the case and argument, *infra,* respondents submit that petitioners' questions 2, 4, and 5 are not properly presented.

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On Petition For A Writ Of Certiorari
To The United States Court of Appeals
For The Eleventh Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals for the Eleventh Circuit (Pet. App. 1-3) is reported at 132 F.3d 677. The opinion of the district court (Pet. App. 4-12) is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on January 9, 1998. The petition for a writ of certiorari was filed on April 9, 1998, and docketed on April 15, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

Petitioner James E. Powell, plaintiff below, filed a complaint against the State of Florida in the United States District Court for the Southern District of Florida in March 1995 on behalf of himself and all other similarly situated employees of the State. Powell sought to recover allegedly due and unpaid overtime wages under the Fair Labor Standards Act, 29 U.S.C. §201 et seq. ("FLSA").

In November 1995 Powell filed a motion for leave to distribute notification of opt-in rights to similarly situated employees. The district court, by order of April 5, 1996, directed the State to file a response. In March 1996, before entry of that order, this Court rendered its landmark decision in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996). On the State's motion, the district court permitted the State to amend its answer to raise the Eleventh Amendment defense recognized in *Seminole Tribe*. The district court also permitted petitioners to file an amended complaint to include a count for injunctive relief and to add Governor Lawton M. Chiles, Jr., and William Linder, secretary of the Florida Department of Management Services, as defendants in their official capacities.

Relying on *Seminole Tribe*, the district court held that the Eleventh Amendment barred petitioners' claim against the State for unpaid overtime wages. (Pet. App. 4 et seq.) It also ruled that under FLSA only the Secretary of Labor had the right to bring an action for injunctive relief. Accordingly, the court dismissed the complaint. (Pet. App. 11) The court decided no Eleventh Amendment defense to the opt-in motion but simply ruled that all pending motions were mooted by the dismissal. (Pet. App. 12) The Court of Appeals affirmed. (Pet. App. 1)

Petitioners' questions one and three are properly presented, but questions two, four and five are not.

Petitioners' second question presented for review does not pose an issue this Court may address because no Florida appellate court has ruled on the question of whether the State's sovereign immunity bars an action in state court under FLSA for unpaid overtime wages. The district court noted that 29 U.S.C. §216(b) authorizes an action in state courts of competent jurisdiction. Whether there is a state jurisdictional bar and whether the Supremacy Clause overrides that bar are not questions that have been decided in this case. Nor have petitioners sought a state court decision. Thus, petitioners' second question improperly seeks an advisory opinion.

The fourth question presented for review presumes in the absence of any record evidence that all of the States helped draft the 1985 amendments to FLSA and thereby collectively waived their Eleventh Amendment immunity. There is no record evidence that all States so acted or that Florida authorized any other state to act for it or that the States at any time consciously and intentionally acted in any way to waive their constitutional immunity.[1]

The fourth question also appears to assert the States may have waived their Eleventh Amendment immunity by "adopting the FLSA." It is not at all clear what this terminology means, but again there is no record evidence in this case that Florida has waived its Eleventh Amendment immunity.[2] What other states

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[1]In their argument (Pet. at 22) petitioners cite *Local 2203 v. West Adams County*, 877 F.2d 814, 821 n.10 (10th Cir. 1989), presumably as evidence of the states' "collective participation." The footnote indicates that all of seven state officials testified before committees of the House and Senate, none identified as representing Florida. There is no indication that those testifying held a commission from the other States authorizing the waiver of the States' constitutional immunity.

[2]Petitioners point out that Florida's Department of Management Services adopted various administrative rules as a result of FLSA. (Pet. 23, 24 and n.3) The rules do not waive Florida's immunity to suit in federal court. This court

have done to "adopt FLSA" is not a relevant consideration, and, in any event, the record is devoid of evidence to support this vaguest of assertions. Hence, the fourth question is not properly before this Court.

The fifth question asks whether the Eleventh Amendment is a defense or bar to sending similarly situated employees notice of their opt-in rights. Neither the district court nor the Court of Appeals ruled that it was. The district court simply ruled the motion to send an opt-in notice was moot in view of dismissal of the amended complaint.

ARGUMENT

I. THE PETITION SHOULD BE DENIED BECAUSE THE DECISION OF THE COURT OF APPEALS IS CORRECT AND DOES NOT CONFLICT WITH A DECISION OF THIS COURT.

A. There is No Conflict With *Seminole Tribe of Florida* or *Coeur d'Alene Tribe of Idaho*.

The decision of the Court of Appeals affirming the district court's dismissal of the amended complaint is so clearly commanded by *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), that petitioners' argument can only be understood as a barely concealed plea to overrule *Seminole Tribe*. There is no conflict between the decision below and *Seminole Tribe*, and petitioners make no direct argument for overruling that decision.

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has repeatedly recognized that a state waives Eleventh Amendment immunity only through the clearest statement of its intent to do so in its statutes or constitution. *See Atascadero State Hosp. v. Scanlon*, 473 U.S. 238, 241 (1985) ("in order for a state statute or constitutional provision to constitute a waiver of Eleventh Amendment immunity, it must specify the State's intention to subject itself to suit in *federal court*." (Emphasis the Court's) *See also Edelman v. Jordan*, 415 U.S. 651, 673 (1974) (quoting *Murray v. Wilson*, 213 U.S. 151, 171 (1909)).

Nor is there any conflict with *Idaho v. Couer d'Alene Tribe of Idaho*, 117 S.Ct. 2028 (1997). Consequently, there is no reason for this Court to grant a writ of certiorari.

The petition does not contend that Congress was exercising any authority other than its Article I Commerce Clause power in enacting and amending FLSA. Thus, *Seminole Tribe* speaks directly to this suit against the State for unpaid wages and the State's assertion of its Eleventh Amendment immunity:

> Even when the Constitution vests in Congress complete lawmaking authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting states. The Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction.

517 U.S. at 72-73.

The meaning of this is quite clear. The Interstate Commerce Clause alone is not a sufficient basis for Congress to abrogate state sovereign immunity. Hence, irrespective of whether Congress intended to abrogate the states' Eleventh Amendment immunity, it has not acted, as it must, pursuant to a valid exercise of power. *See Seminole Tribe,* 517 U.S. at 55. Accordingly, as at least seven circuit courts of appeal have ruled (see Pet. App. 2), the Eleventh Amendment bars an action against a State under FLSA for unpaid overtime wages.

In the face of this unanimous authority, petitioners offer two arguments, one asserting the Court of Appeals' decision "may conflict" with *Seminole Tribe*, and one asserting conflict with the "concepts" of *Idaho v. Coeur d'Alene Tribe of Idaho,* 117 S.Ct. 2028 (1997). (Pet. 7,9)

Petitioners first suggest that the Court of Appeal's decision conflicts with an observation in a footnote in the *Seminole Tribe* decision, *see* 517 U.S. 72, n.16, to the effect that there is no established tradition in the lower federal courts allowing enforcement of the federal copyright, bankruptcy and antitrust laws against the States. Petitioners apparently wish to conclude from the footnote that if States have ever been sued under FLSA, Congress' lack of authority to abrogate the Eleventh Amendment under Article I does not foreclose this action. The Court's observation, however, was made simply in response to Justice Stevens' concern that copyright, bankruptcy and antitrust laws would no longer be enforceable against the States and is in tandem with the Court's statement that it was never widely thought that those laws abrogated the States' sovereign immunity to begin with. This is no basis for the assertion of conflict. *See* Stern et al., *Supreme Court Practice* §4.3 (7th ed. 1993) (conflict must be real or intolerable on the same matter of law or fact, not merely an inconsistency in dicta or in the general principles utilized).

Nevertheless, even assuming the majority intended to hedge its ruling in a footnote response to the concerns of a dissenting Justice, there is plainly no "established tradition" of enforcing FLSA claims against States in the lower federal courts. Indeed, in support of an "established tradition" petitioners cite six appellate decisions that span the gamut from 1993 to 1994. (Pet. 8) A more extended review of relevant cases demonstrates that actions against States under FLSA have historically been subject to varying pronouncements, and the States' suability under that act has always been fraught with uncertainty.

In *Employees v. Missouri Public Health Dept.*, 411 U.S. 279, 281 (1973), this Court held that FLSA contained no clear statement of Congress' intent to abrogate the Eleventh Amendment. Three years later, after Congress amended FLSA, this Court ruled that the Tenth Amendment barred application of FLSA to the States. *See National League of Cities v. Usery*, 426 U.S. 833 (1976), overruling *Maryland v. Wirtz*, 392 U.S. 183

(1968). Twelve years later, the Court overruled *National League of Cities* in *Garcia v. San Antonio Metro Transit Auth.*, 469 U.S. 528 (1988). Then, in *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), a plurality opinion suggested for the first time that Congress could abrogate the States' Eleventh Amendment immunity pursuant to the Commerce Clause, provoking the sharp dissent of four Justices.

There then followed a few years in which States were theoretically subject to FLSA claims, until *Seminole Tribe* overruled *Union Gas Co.* in 1996. The fact that there were a few such cases during that brief interlude cannot support the conclusion that there was ever an established tradition of enforcing FLSA wage claims against the States.

Relying on "the concepts expressed" in *Idaho v. Coeur d' Alene Tribe, supra,* petitioners further complain that they will have no remedy for unpaid wages if Florida courts refuse to hear their claims on the ground that Florida has not waived its sovereign immunity in state court. (Pet. 9) As indicated in the statement of the case, respondents submit this question is not properly before the court. Petitioners can point to no Florida appellate decision ruling that the State's sovereign immunity bars FLSA claims, and, indeed, have apparently not undertaken to obtain a state court ruling themselves. Tellingly, the most their petition can assert is their belief that Florida's sovereign immunity would "probably" bar FLSA claims. (Pet. 21, 24) Plainly, they are uncertain how Florida courts would rule on this question, just as they are uncertain whether the Supremacy Clause would override that immunity and compel Florida courts of general jurisdiction to entertain FLSA claims. (Pet. 10,11)

Having not sought a ruling in state court, however, petitioners are in no position to submit such a question to the Court in this proceeding. This Court does not address hypothetical issues or render advisory opinions. *See United Public Workers of America v. Mitchell*, 330 U.S. 75, 90 (1947); *United States v. Freuhauf*,

365 U.S. 146, 157 (1961).

There can be no conflict with *Idaho v. Coeur d'Alene Tribe* in any event. That decision was concerned only with the use of the fiction of *Ex parte Young*, 209 U.S. 123 (1908), as a means for the Coeur d'Alene Tribe to avoid Idaho's Eleventh Amendment immunity and gain control of, or possibly title to, state sovereignty lands, a result acknowledged to have as intrusive an effect on Idaho's sovereign interests "as almost any conceivable retroactive levy upon funds in [the state] Treasury." 117 S.Ct. at 2043. The Court's rejection of the Tribe's claim was not premised upon the availability of a state court quiet title action, but on the impact of the Tribe's claim on Idaho's sovereign interests. The *Ex parte Young* fiction did not apply where the relief sought was so clearly against the State of Idaho. Where the *Young* fiction is available, it provides a basis for injunctive relief only, not money from a state's treasury.[3]

B. Petitioners Are Not Entitled to Injunctive Relief Under *Ex parte Young*.

Petitioners contend that the "practical effect" of the decision of the Court of Appeals is to leave them a right but no remedy, and from this they conclude that, constitutionally, prospective injunctive relief under *Ex Parte Young* must be available to enforce the Supremacy Clause. Petitioners err in their premise and in their conclusion.

The Court of Appeals held, as have all other courts addressing

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[3]The thought underlying Part II.B of the principle opinion that petitioners seemingly rely on was that federal courts might not be obligated to entertain *Ex Parte Young* actions if there is an available state court forum. Only Chief Justice Rehnquist joined this portion of Justice Kennedy's opinion. Justice O'Connor pointed out that "[t]he principle opinion cites not a single case in which the Court expressly relied on the absence of an available state forum as a rationale for applying *Young*." 117 S.Ct. at 2045 (O'Connor, J., joined by Scalia, J., and Thomas, J., concurring in part and concurring in the judgment).

the issue, that under the provisions of FLSA only the Secretary of Labor may seek injunctive relief. (Pet. App. 2). The provisions of FLSA are clear that this is the Secretary's right exclusively, while employees may sue for legal liability, *i.e.*, minimum wages or overtime. *See* 29 U.S.C. §§211(a), 216(b) (1994). (Pursuant to § 216(b), employees may seek equitable relief only to effectuate the purposes of §215(a)(3). Petitioners have not sought such relief in this action.) Contrary to the implication of their argument, petitioners are not constitutionally bereft of a remedy. First, and most obvious, they could ask the Secretary of Labor to bring suit. Assuming the Secretary lacks the resources, as they contend, they could bring that fact to the attention of Congress, which could amend the law. The fact that Congress has chosen to limit the right to seek injunctive relief to the Secretary in no way implicates the Supremacy Clause. If petitioners have a right without a remedy it is not by virtue of the decisions of the federal appellate courts on this question.

Petitioners effectively ask the Court to rewrite the statutory scheme to give them a broader remedy than Congress intended. The same request was put to the Court and rejected in *Seminole Tribe*. *See* 517 U.S. at 74. The Court there explained that where Congress creates a remedial scheme for the enforcement of a particular federal right, the Court will not create a supplemental remedy against a federal officer, nor will it cast aside clear statutory limitations to permit an action against a state officer based upon *Ex Parte Young*. The Court further explained:

> Contrary to the claims of the dissent, we do not hold that Congress cannot authorize federal jurisdiction under Ex Parte Young over a cause of action with a limited remedial scheme. We find only that Congress did not intend that result in the Indian Gaming Regulatory Act.

Id. at 75 n. 17. As petitioners acknowledge, following this Court's decision in *Employees v. Missouri Public Health Dept.*,

411 U.S. 279 (1973), Congress acted quickly to make clear its intent to abrogate the States' Eleventh Amendment immunity and apply FLSA to the States. (Pet. 14-15) If so motivated, Congress can also amend 29 U.S.C. §211(a).

Finally, petitioners claim they are not seeking injunctive relief to obtain wages or reinstatement. (Pet. 15) Rather, they seek "to obtain reclassification or a change in rules applicable to them," relief which they argue is not foreclosed by the exclusive authority given the Secretary. (Pet. 15). The authority given the Secretary by 29 U.S.C. §211(a), however, is to bring "all actions" to restrain "violations of the Act." If current classifications or Florida rules are not in violation of the FLSA, there is no relief to be sought by anyone. If they are in violation, only the Secretary has the authority to sue for injunctive relief.

II. THE PETITION SHOULD BE DENIED BECAUSE PETITIONERS' POLICY ARGUMENTS FAIL TO SHOW ANY COMPELLING REASON FOR GRANTING A WRIT OF CERTIORARI.

As additional reasons for granting the writ, petitioners speculate about the possibility of state court decisions differing over FLSA; again complain, mistakenly, that they have a right without a remedy; and again assert that the *possible* lack of a state court forum means that the Supremacy Clause *must* trump the Eleventh Amendment. The first and third are based on speculative assumptions and the second is simply wrong.

Petitioners also suggest that because of some States' participation in the amendment drafting process and because Florida adopted certain administrative rules to implement its obligations under FLSA, the States have somehow collectively lost their Eleventh Amendment immunity. (Pet. 22-24) No legal authority supports this most curious contention. To the contrary, this Court has ruled that a State's participation in a federal program does not suffice to waive its Eleventh Amendment

immunity. *Edelman v. Jordan*, 415 U.S. 651, 673-674 (1974); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 238, 246-247 (1985). *See also Florida Dept. of Health and Rehab. Services v. Florida Nursing Home Ass'n*, 450 U.S. 147, 150 (1981) (per curiam) (state's agreement to abide by federal law in administering program cannot be deemed an express waiver of Eleventh Amendment immunity).

As to the handful of state officials who testified or participated in the amendment process, the non-record material petitioners cite does not even vaguely suggest those participants were acquiescing on behalf of all States in a waiver of the States' immunity. Petitioners cite no authority in support of the notion that mere participation in the lawmaking process suffices to waive Eleventh Amendment immunity, or that one State's participation can waive the immunity of another, or that of a few the immunity of all. Indeed, such a suggestion reflects no understanding of our federalist structure, which preserved the sovereignty of the individual States. *See Gregory v. Ashcroft*, 501 U.S. 452 (1991). The chaotic idea that one sovereign state can lose its immunity because another participates in the federal legislative process, while novel, hardly presents a compelling issue in need of this Court's attention.

CONCLUSION

The petition for a writ of certiorari should be denied.

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In The

Supreme Court of the United States

October Term, 1997

JAMES E. POWELL, et al.,

Petitioners,

v.

THE STATE OF FLORIDA, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY

The State does not deny that the Questions Presented are important questions of federal statutory and constitutional law that should be settled by the Court. Nor does the State deny that it benefits monetarily from the special exceptions accorded public sector employers in the 1985 FLSA amendments. Instead, it claims three of the five questions are not properly presented.

A. Questions (2) & (5) Address Duties Of Federal Courts Faced With Motions To Dismiss On Eleventh Amendment Grounds.

According to the State, Question (2) is hypothetical and merely seeks an advisory opinion on whether state sovereign immunity bars actions for unpaid FLSA wages in Florida's state courts. This mischaracterizes the question which actually asks: "May a federal district court dismiss employees' FLSA action on Eleventh Amendment grounds, if the State-employer refuses to consent to suit in its own courts for FLSA claims, and its courts deem the sovereign immunity defense a jurisdictional bar?"

It addresses duties of federal courts. In essence, it asks whether a district court may dismiss a federal question case without reaching the merits, unless it is clear that an alternative forum is available and will hear the case.

This is neither hypothetical, nor a new concept. For example, in *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981), the Court reaffirmed that before a federal court dismisses a case on the grounds of *forum non conveniens*, it must first

determine whether there is an adequate alternative forum available to the plaintiff, and may not dismiss if "the alternative forum does not permit litigation of the subject matter of the dispute." *Id.* at n. 22 (citing *Phoenix Canada Oil Co. Ltd. v. Texaco, Inc.*, 78 F.R.D. 445 (D. Del. 1978) (court refusing to dismiss where unclear whether alternative forum will hear case)).

Indeed, *Piper* suggested that when in doubt, the district court might condition dismissal on defendant's agreement to waive objections it could have raised in the alternative forum. *Id.* n.25. *See also Mississippi v. Louisiana*, 506 U.S. 73 (1992) (Court must first explore availability of alternative forum before declining exercise of original jurisdiction).

The district court here did neither – no dismissal only on condition that the State waive its state law sovereign immunity; no assurance that Florida's state courts will accept jurisdiction of a federal question case over the State's refusal to consent to it and its assertion of sovereign immunity to bar jurisdiction.[1] It is appropriate to ask the Court to review the propriety of dismissal under these circumstances.

The State scoffs at the role of the Supremacy Clause in these circumstances. But, if a state refuses to choose a federal or state forum for FLSA claims against it, then the

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[1] Currently, there is no decision that unambiguously holds a state court *must* hear a federal question case despite its State's invocation of a sovereign immunity bar. Decisions to date have been against private parties, or local governments rather than the state itself, or have rested on the state court's discrimination against federal rights of action.

federal court acting pursuant to the Supremacy Clause, should impose the federal forum over the state's Eleventh Amendment objections. The Eleventh Amendment did not repeal the Supremacy Clause.

Rather, the Supremacy Clause gives Congress power to impose its will on the States as long as it acts within the powers granted to it under the Constitution. *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). This must include the power to enforce a valid federal law in federal courts if the state refuses to allow suits in its own courts.

This is similar to the concept of "cooperative federalism" recognized in *New York v. U.S.*, 505 U.S. 144, 167, 173-174 (1992): "where Congress has the authority to regulate private activity under the Commerce Clause, we have recognized Congress' power to offer States the choice of regulating that activity according to federal standards or having state law preempted by federal regulation." (Citations omitted). Florida does not have its own minimum wage and maximum hour laws.

The State also proposes that Petitioners should have first *refiled* this case, suffered statute of limitations problems, and lost an appeal of the question in Florida's courts, before petitioning this Court for review. This would impose untenable risks on employees who have a statutory right to be heard. There is no requirement in the law that Petitioners refile in state court and suffer rejection there first (perhaps after years of litigation and appeals), before asking this Court to review the propriety of their dismissal from federal court.

The risks of refiling in state court are considerable since the FLSA empowers state courts to entertain suits

arising under it, but does not require them to do so – it does not "force a duty upon such courts as against a valid excuse". *Douglas v. New York*, 279 U.S. 377, 387-388 (1929) (citations omitted) (discussing Employers' Liability Act which gives concurrent jurisdiction to federal and state courts).

With respect to Question (5), it is quite apparent that the district court intentionally delayed and then declined to decide the opt-in motion (and did not enforce its own order that the State respond to it), because of the Eleventh Amendment defense. It ruled on motions filed after the opt-in motion.

B. Injunctive Relief For State Employees

1. Injunctive relief is not "exclusive" to the Secretary because employees have an express right to seek it. The State claims the Secretary has the "exclusive" right to bring all actions for injunctive relief. The text of the FLSA does not support this.

First, it cannot be said that the Secretary has the "exclusive right" to seek injunctive relief, when 29 U.S.C. § 216(b) *expressly* gives employees the right to seek equitable relief on their own, unless and until the Secretary intervenes. If the Secretary does not intervene under § 217, employees have an unqualified right to bring and maintain an action for both legal and equitable relief under § 216(b). This is significant because it indicates Congress was not opposed to employees seeking and receiving injunctive relief on their own.

Second, the full quote of this portion of § 211(a) states, "the Administrator shall bring all actions under section 17 to restrain violations of this Act." This language means the Secretary must proceed, *if at all*, under § 217 – she cannot proceed under § 216(b). The language does not prevent employees from suing under § 216(b). Nor does the language prohibit employees from seeking enforcement by injunction, of the regulations impiementing 29 U.S.C. § 213(a)(1).[2]

2. State Employees awarded *Ex parte Young* relief would receive far less than the FLSA gives all other public and private employees. The State also claims that if state employees were permitted relief under *Ex parte Young*, 209 U.S. 123 (1908), they would be getting a "broader remedy than Congress intended." Opp. p. 9. The opposite is true. State employees would be receiving far *less* than all other public and private sector employees who are eligible for two to three years of back wages, plus liquidated damages, plus an end to the violations.

Because the Eleventh Amendment is available only to states, the *Young* exception should be available to state employees who are the only ones affected by such a defense. While the court declined *Young* relief to the plaintiffs in *Seminole*, 517 U.S. 44, 116 S.Ct. 1114, 1132-1133 (1996), it did so only because the statute would be superfluous if plaintiffs could substitute *Young* and obtain the full remedial powers of the federal court, thus

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[2] Indeed, the only regulations mentioned in § 217 for which the Secretary may seek restraint, are those under § 214 which is limited to students, apprentices, and handicapped workers. No mention is made of the executive regulations under § 213(a)(1).

giving them more complete and immediate relief than provided for in the statute itself. This is not a danger here.

C. Question (4) Presents A Question Of Federal Law Based Upon A Legislative Record That Shows The National Political Process Worked.

The State claims Question (4) is improper because there is no record evidence proving all states helped draft the 1985 FLSA amendments or that Florida acted to waive its Eleventh Amendment immunity to FLSA suits in federal courts. On the contrary, it is a question of law based upon available legislative history.

Moreover, its argument misses the point. The State does not claim the national political process operated in a "defective manner", or that it was somehow precluded from participating in it, or that the process was inadequate to protect it.[3] This is the test under *Garcia*, 469 U.S. 528, 556 (1985), *South Carolina v. Baker*, 485 U.S. 506, 513 (1988), and *Gregory v. Ashcroft*, 501 U.S. 452, 464, 477 (1991). The test is not whether each state individually chose to participate.

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[3] Notably, the State never alleges that it did not participate in some fashion (by letter or lobby). In any event, the National Conference of State Legislatures and National Association of State Personnel Directors actively lobbied on behalf of the states. 1985 U.S. Code Cong. & Admin. News 651, 657 (1985).

D. FLSA Has Applied To States For More Than Thirty Years.

The State claims there is no established tradition of enforcing FLSA claims against states in federal courts because such cases only span 1993 to 1994. In doing so, it overlooked (among other cases) the 1991 decision against it in *Dybach v. State of Florida*, 942 F.2d 1562 (11th Cir. 1991), and *Maryland v. Wirtz*, 392 U.S. 183 (1968), which was an FLSA case against a state.

It also misconstrues the significance of the history of the FLSA. The FLSA was enacted sixty years ago. For more than thirty of those sixty years the FLSA applied to states' non-traditional functions, and from 1986 to the present, it has applied to *all* state functions. Moreover, once Congress amended the FLSA in 1974 to correct the deficiencies to abrogation noted in *Employees v. Missouri*, 411 U.S. 279 (1973), under prevailing law (prior to *Seminole*) this clear statement of intent by Congress was sufficient to render states suable for FLSA claims in federal courts.

CONCLUSION

The Petition for writ of certiorari should be granted.

Respectfully submitted,

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